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In the Supreme Court of the United States.

OCTOBER TERM, 1948

FEDERAL POWER COMMISSION, *Petitioner,*
vs.

PANHANDLE EASTERN PIPE LINE COMPANY,
et al.

**BRIEF OF RESPONDENT STATE CORPORATION COM-
MISSION OF THE STATE OF KANSAS IN
OPPOSITION TO THE PETITION FOR
WRIT OF CERTIORARI**

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OPINIONS BELOW

The finding of fact, conclusions of law and opinion of the United States District Court for the District of Delaware appear in the record (R. 49-50, 60-66). The opinion of the United States Court of Appeals for the Third Circuit, not yet officially reported, appears in the record (R. 74-81).

SUPPLEMENTAL STATEMENT OF FACTS

Pertinent characteristics of the Panhandle Company and its operations are adequately described in the Petition of the Power Commission (Petition, p. 4) and in the Brief of Panhandle (Panhandle Brief, pp. 1-2) as are the transactions giving rise to the unsuccessful injunction proceedings in the courts below. (Petition, pp. 6-7, and Panhandle Brief, pp. 2-3.)

The Corporation Commission of Kansas exercises jurisdiction over the production and marketing of natural gas and regulates the rates and services of public utilities operating within the State of Kansas (R. 70-74). It has no more than an observer's interest in the stock transfers and financial transactions which are so engrossing to the two principals in this litigation. It is deeply concerned with the jurisdictional questions relating to the transfer by Panhandle to Hugoton of gas and gas-and-oil leases covering acreage in the Kansas Hugoton Field. Aside from its desire to exercise fully its statutory jurisdiction free from dependence on the Power Commission's consent, the Corporation Commission is interested in the supply of natural gas Hugoton will make available to a Kansas utility serving 52,500 Kansas gas users (R. 71). This latter interest quite possibly has emphasized the jurisdictional quarrel (R. 72-73).

The leases transferred by Panhandle to Hugoton cover undeveloped acreage (R. 25 and 31) within the Kansas Hugoton Field. That is, there are no wells on and there is no present production from the leases involved. The Corporation Commission has encouraged the free trading of leases and production rights in the Hugoton Field to facilitate prevention of waste, protection of correlative rights and to secure orderly development in and of this common source of supply (R. 72). These are its duties under the applicable Kansas statutes. (G. S. of Kansas 1947 Supp., 55-701 to 55-713, pertinent portions of which are set forth in an appendix beginning on page 12.)

These proceedings mark the first attempt by the Federal Power Commission to exercise regulatory jurisdiction over the transfer of gas leases (R. 47) and it claims its approval of the transfer should have been sought by reason of implied obligations arising under the certificate sections of the Natural Gas Act (R. 46).

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals below is clearly and correctly in accord with the decisions of this court dealing with the Natural Gas Act and there is no conflict among Circuit Courts of Appeals as to the questions here presented.

ARGUMENT

The Natural Gas Act does not confer upon the Federal Power Commission jurisdiction over the acquisition and transfer of gas leases.

Authority of the various states to regulate "production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern" was recognized and respected by Congress in its enactment of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. A. 717-717W; *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682 1. c. 690. Accordingly, the broad grant of jurisdiction was made inapplicable by Section 1 (b) to "production or gathering of natural gas." This court has held the activity of producing or gathering natural gas beyond the regulatory reach of the Power Commission and subject to regulation only by the states. *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581 1. c. 597; *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682 1. c. 689.

The question is whether the transfer of gas leases by a natural gas company is subject to regulation under the act or is an activity of "production or gathering" specifically excluded from its application. The courts below determined such transfers were excluded. We think those determinations clearly correct.

The Act applies to the transportation and to the sale of natural gas in interstate commerce and to natural gas companies engaged in such transportation or sale. Transfer of an undeveloped gas lease is neither transportation nor sale in interstate commerce of natural gas. The Power Commission asserts that a natural gas company certificated under the Act has an implied obligation to secure Commission approval before effecting a transfer of its leased reserves. From the argument of its counsel, we take it that the Commission's view is this implied obligation holds regardless of the extent of the transfer (R. 46-48 inc.). Gas leases have been freely sold and exchanged in the industry for many years. Undoubtedly, this practice was known to the legislative architects designing the law. It is admitted by the Power Commission it always has known. No reference, beyond the exclusion in Section 1 (b), to this practice is found in the Act and no rule or regulation of the Power Commission makes mention of gas reserve transfers or of the alleged obligation it now attempts to enforce. If the obligation is implied, so must be the Commission's power to enforce it and surely no power in the Commission can be implied which reaches beyond the Act's defined applicability.

If the transfer of gas leases is an activity of production

or gathering, it is not regulable as such by the Power Commission even if accomplished by a natural gas company subject to the act.

Production of gas is the ultimate objective to be attained in securing a gas lease. The activity of securing and exchanging leases relates only to production and to no other phase of a natural gas company's operations. This activity and its objective, production, is completed before the incidents of Power Commission jurisdiction attach. It is an integral part of production and falls within the field of regulation left to the states.

The Corporation Commission of Kansas is exercising jurisdiction over production of natural gas in the Hugoton Field. It seeks to prevent waste, protect correlative rights and secure the orderly development in and of the Hugoton Field. It encourages the free exchange of leases because it has found that facilitates orderly development and the accomplishment of the other statutory goals. (See G. S. 1947 Sup., 55-703 in the appendix at page 12.) The Corporation Commission feels the Power Commission's assertion of jurisdiction over transfers of leased reserves is an unwarranted interference with the full and free exercise of this state's authority.

That Congress intended no conflict between Federal and state authority to arise from the Natural Gas Act is clear in the decisions of this court.

Public Utilities Co. v. United Fuel Gas Co., 317 U. S. 456, 87 L. Ed. 396.

Illinois Nat. Gas Co. v. Central Ill. Pub. Serv. Co., 314 U. S. 498, 86 L. Ed. 371.

Federal Power Comm. v. Hope Natural Gas Co., 320 U. S. 591, 88 L. Ed. 333.

Colorado Interstate Gas Co. v. Federal Power Comm., 324 U. S. 581, 89 L. Ed. 1206.

Interstate Natural Gas Co. v. Federal Power Comm., 331 U. S. 682, 91 L. Ed. 1742.

Panhandle Eastern Pipe Line Co. v. Public Service Comm., 332 U. S. 507, 92 L. Ed. 173.

In the *Panhandle* case last cited, this court said:

"The declaration, though not identical in terms with the one made by the McCarran Act concerning continued state regulation of the insurance business, is in effect equally clear, in view of the Act's historical setting, legislative history and objects, to show intention for the states to continue with regulation where Congress has not expressly taken over." 332 U. S. 507 l. c. 521.

The implication forced by the Power Commission from an unwilling Act should not be permitted, in the face of the decisions cited and the above quotation, to promote a conflict between state and Federal authority which the Congress meticulously sought to avoid.

The Courts below were correct in refusing the injunction applied for.

Section 20 (a) of the Natural Gas Act reads in part as follows:

"Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or if any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States to enjoin such acts or practices."

Our view is that the transfer of gas leases here involved is beyond the applicability of the Natural Gas Act and so beyond the Power Commission's jurisdiction. It cannot be an act or practice which constitutes or will constitute a violation of the Act or of any rule, regulation or order thereunder.

Following our argument concerning jurisdiction *supra*, we disagree with the Power Commission's assertion that "there is at least a reasonable basis for Commission control over a natural gas company's disposition of its gas reserves." (Petition, p. 16.) Therefore, if the court had limited its inquiry, as the Power Commission suggests it should have, into whether there was any reasonable basis for Commission jurisdiction (Petition, p. 16) denial of the injunction would have been the correct disposition of the case.

CONCLUSION

The decisions below were grounded on well settled principles and are clearly correct. There is no conflict among the Circuit Courts of Appeals on any of the questions involved in this case.

The petition of the Federal Power Commission for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectively submitted,

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APPENDIX

The pertinent Kansas Statutes (citations to G. S. 1947 Supp.) read in part as follows:

"55-703. *Production regulations, rules and formulas.* That whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste. . . . The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. . . ."

"55-703a. *Well spacing and orderly development.* The drilling and completion of a gas well shall not of itself entitle said well to an allowable for production; and the commission may, in its

discretion, provide for well spacing in any such common source of supply and provide for the orderly development thereof."

"55-704. *Rules and regulations authorized; notice and hearings.* The commission shall promulgate such rules and regulations as may be necessary for the prevention of waste as defined by this act, . . . and as the commission may find necessary and proper to carry out the spirit and purpose of this act:"

"55-705a. *Certificate required; notice and hearing.* Before any gas shall be produced from a well producing gas only, or from a well which is primarily a gas well, for any of the purposes specified in section 2 (55-702) of this act, a certificate shall be obtained from the commission for the construction of the facilities necessary or required and/or the utilization of the gas in the manner and for the purposes intended;"

